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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief of the Equal Employment Advisory Council ("EEAC") as *amicus curiae* in support of petitioners is submitted with the written consent of all parties.[1] EEAC is a voluntary, nonprofit association organized as a corporation under the laws of the District of Columbia.

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[1] Their consents have been filed with the Clerk of the Court.

EEAC was founded to represent and promote the common interest of employers and the general public in developing and implementing sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers as well as trade and industry associations whose employer-members have a common interest in the foregoing purposes. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal aspects of equal employment opportunity policies.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981, and various other federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issue presented by the instant case, *i.e.*, whether the certification procedures of FED. R. CIV. P. 23 apply to a civil action filed by the EEOC under Section 706 of Title VII seeking class relief. Because of this interest, EEAC has been permitted to participate as *amicus curiae* in the court below and in other courts of appeals involving the same or similar issues. *See EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978). The EEAC has also filed briefs as *amicus curiae* in cases in this Court involving important equal opportunity issues. *See, e.g., Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

FACTS AND DECISION BELOW

The proceedings below arose out of a suit filed in the United States District Court for the Western District of Washington by the EEOC pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5. In its amended complaint, the EEOC alleged that defendants, General Telephone, one of its subsidiaries, and a local union of the International Brotherhood of Electrical Workers, had discriminated against women employees. The complaint sought, *inter alia*, a permanent injunction and an order requiring the defendants to provide back pay to a class of individuals allegedly affected by the challenged practices. Pet. App. A7.[2] The EEOC identified the class as " 'all female employees, female applicants for employment and women who would have applied but for the alleged unlawful discrimination.' " Pet. App. A7 n.1. Defendants moved to dismiss the class action aspects of the complaint on the grounds that the EEOC failed to comply with Rule 23 of the Federal Rules of Civil Procedure and the district court's Local Rule 23.[3] Pet. App. A26.

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[2] "Pet. App." refers to the appendix of the Petition for Certiorari filed in this case.

[3] FED. R. CIV. P. 23 permits the consolidation of a large number of individual claims in a single lawsuit. It sets forth procedures to determine the adequacy of the class representative and the appropriateness of maintaining the suit as a class action. The principal effect of applying Rule 23 to Section 706 suits brought by the EEOC is to assure finality to a litigated judgment, thereby avoiding a multiplicity of suits involving the same claim of discrimination and the same defendant. Local Rule 23 of the Western District of Washington prescribes the procedural steps for securing district court certification of the proposed class.

A United States Magistrate, acting as a Special Master, determined in a Report and Recommendation, later adopted by the district court, that the EEOC could proceed with the class action aspects without satisfying the requirements of Rule 23, and denied the motion to dismiss. Pet. App. A25-A32.[4] The district court expressly declined to follow the Fifth Circuit's contrary decision in *EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). Pet. App. A26, A32.

On June 27, 1979, the Court of Appeals for the Ninth Circuit, affirmed the order in an opinion written by Senior District Judge Jameson.[5] The court recognized that by virtue of the 1972 amendments to Title VII, Congress had authorized the EEOC to file class action suits seeking to redress the grievances of others, but concluded that Congress had failed to specify whether such EEOC class action suits are subject to the certification requirement of Rule 23. Pet. App. A8-A16. The court also concluded that application of Rule 23 to individual Section 706 class suits does not mandate EEOC compliance with Rule 23 because of a dichotomy that the court perceived between EEOC's litigation role under Section 706, which is to vindicate the public interest, and that of private plaintiffs who seek to redress their private injury. Pet. App. A16-A18. The court examined the principal Rule 23 prerequisites for class certification to determine whether EEOC could satisfy those requirements consistent with its statutory mandate under Section 706, and concluded that the EEOC would have no difficulty qualifying under the membership and adequacy of representation requirements of Rule 23(a), by virtue of the congressional determination that "the EEOC is a 'properly suing party' . . . [and]

[4] The district court's opinion is reported at 16 FEP Cas. 476 (W.D. Wash. 1977).

[5] The opinion is reported at 599 F.2d 322 (9th Cir. 1979).

an adequate representative of victims of employment discrimination." Pet. App. A11-A12, A21. The court, however, perceived an obstacle to qualification under the typicality of claims or defenses requirement because of the dichotomy of interests it believed existed between the interests of private individuals and the EEOC's public interest duty under Section 706. Pet. A12. Nonetheless, in an about-face, the court held that the EEOC satisfies the Rule 23(a) certification requirements. Pet. App. A21.

Despite this conclusion, the court still refused to apply Rule 23 to EEOC suits under Section 706. First it compared the EEOC suits authorized by Sections 706 and 707, and found little practical difference between the two actions. Since Rule 23 had not been made applicable to Section 707 pattern or practice cases, the court could find no reason to distinguish between the two types of actions insofar as the applicability of Rule 23 was concerned. Pet. App. A18-A21. Second, the court was concerned that the class certification process would be "time consuming and costly," and "serve no useful purpose in the final disposition of the case." Pet. App. A23. Finally, although acknowledging the necessity of providing Title VII litigants the procedural safeguards embodied in Rule 23, the court believed that the authority of district courts under Section 706(g), 42 U.S.C. § 2000e-5(g), to fashion broad, equitable, substantive relief also permits trial judges to adopt Rule 23's procedural safeguards without actually certifying the case under that rule. Pet. App. A21-A23.

The Ninth Circuit's decision in this case conflicts with the Fifth Circuit's holding in *Holmes* that Rule 23 applies to EEOC suits for class relief under Section 706. *See also EEOC* v. *Datapoint Corp.*, *supra*, 570 F.2d at 1268. The district courts are also in conflict over this issue.[6] Not unexpectedly, this spreading conflict

[6] Cases holding Rule 23 applicable to EEOC suits include: EEOC v. Westinghouse Electric Corp., 81 F.R.D. 528, 529 (M.D.N.C.

in the courts has spawned a similar debate among commentators.[7]

SUMMARY OF ARGUMENT

I.

The 1972 amendments to Title VII of the Civil Rights Act of 1964 made two major changes respecting judicial enforcement of the statute, one of which is directly relevant to the instant case. In the relevant change, an amendment to Section 706, Congress granted authority

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1979); EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979); EEOC v. Page Eng'r Co., 17 FEP Cas. 1638 (N.D. Ill. 1978); EEOC v. Continental Oil Co., 13 FEP Cas. 785 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977).

Decisions holding to the contrary include: EEOC v. Federal Reserve Bank, 21 FEP Cas. 742 (W.D. Tenn. 1979); EEOC v. Bumble Bee Seafoods Co., 19 EPD ¶ 9160 (D. Ore. 1979); EEOC v. Mid-City Care Center, 20 EPD (CCH) ¶ 30,275 (W.D. Tenn. 1979); EEOC v. Stroh Brewery Co., 83 F.R.D. 17 (E.D. Mich. 1979); EEOC v. Singer Controls Co. of America, 80 F.R.D. 76 (N.D. Ohio 1978); EEOC v. Raymond Metal Prod. Co., 17 FEP Cas. 206 (D. Md. 1978); EEOC v. Schlueter Mfg. Co., 17 FEP Cas. 53 (E.D. Mo. 1978); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978); EEOC v. Pinkerton's, Inc., 14 FEP Cas. 1431 (W.D. Pa. 1977); EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575, 577 (E.D. Wash. 1976); EEOC v. CTS of Asheville, Inc., 13 FEP Cas. 852 (W.D.N.C. 1976); EEOC v. Rexene Polymers Co., 10 FEP Cas. 61 (W.D. Tex. 1975); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73 (E.D. Mich. 1975); EEOC v. Lutheran Hosp., 10 FEP Cas. 1177 (E.D. Mo. 1974); and EEOC v. Mobil Oil Corp, 362 F. Supp 786, 792 (W.D. Mo. 1973).

[7] Two commentators have supported the position that Rule 23 applies to EEOC suits. *See* Comment, *Certification of Class Suits Under Rule 23*, 46 U. CHI. L. REV. 690 (1979) (hereinafter "Comment"); Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission*, 29 CASE W. RES. L. REV. 343 (1979) (hereinafter "Bumpass"). One commentator has taken the opposite view. *See* Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co.*, 28 SYRACUSE L. REV. 741 (1977).

to the EEOC to institute suits in federal district court based upon a charge filed with the Commission by an individual alleging a violation of the Act.[8] The second major change, not directly relevant here, was an amendment to Section 707 whereby Congress transferred to the EEOC from the Attorney General authority to institute pattern or practice suits in the federal courts.[9]

Prior to the amendments, only an individual charging that he or she had been injured by a violation of the Act was permitted to initiate a Section 706 suit. The courts had determined that such actions, although grounded in an individual charge, could qualify for class treatment, provided that the provisions of Rule 23 of the Federal Rules of Civil Procedure were satisfied.

The authority granted by the 1972 amendments to the EEOC to sue on behalf of aggrieved individuals does not otherwise alter the nature of a Section 706 suit. There is no basis—either in the statutory language, legislative history, or considerations of policy—for construing the 1972 amendments as creating two different procedures in Section 706 cases—one applicable to suits brought by private litigants, the other applicable to cases brought by the EEOC on behalf of aggrieved private individuals—when the scope of available remedies and the standards of proof and liability are the same regardless of the plaintiff's identity. The legislative history of the amendments, in fact, provides affirmative support for the position that EEOC class-wide suits, like identical private suits, are subject to the procedural requirements of Rule 23.

II.

Application of Rule 23 to suits brought by the EEOC in no way impairs the ability of the agency to carry out

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[8] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[9] § 707(a), 42 U.S.C. § 2000e-6(a).

its enforcement responsibility. The rule simply provides a procedural framework for discharging that responsibility and assuring fairness to all parties, including the individuals for whose benefit the EEOC has filed suit.

The purposes served by Rule 23 apply uniformly to all Section 706 class actions, regardless of the identity of the representative plaintiff. Rule 23 aids in early definition of the class, thereby permitting aggrieved individuals to determine whether their interests are being represented by the named plaintiff. It also provides notice to defendants of the scope of the charges against them. The rule provides for increased judicial control of the litigation to assure that the interests of absent class members are adequately protected, particularly if the litigation is to be settled. And lastly, the rule advances the congressional interest in finality of proceedings and avoidance of duplicative litigation, a major concern under Section 706 because of the existence of parallel EEOC and private litigation remedies. These interests are no less important when the EEOC brings a class action under Section 706 than when a private plaintiff initiates the identical suit under the same statute.

ARGUMENT

I. THE 1972 AMENDMENTS TO SECTION 706 OF THE CIVIL RIGHTS ACT OF 1964 AUTHORIZE THE EEOC TO SEEK CLASS-WIDE RELIEF AGAINST EMPLOYMENT DISCRIMINATION IN ACCORDANCE WITH THE SAME PROCEDURES APPLICABLE TO IDENTICAL PRIVATE SUITS

A. Congress Did Not Change The Scope Of Section 706 Actions When It Authorized The EEOC To File Civil Actions Under That Section

The class action procedures of Rule 23 apply when a private party claimant brings a class suit under Section 706 of the Civil Rights Act of 1964, *as amended*, 42

U.S.C. § 2000e-5, for redress of unlawful employment discrimination. The question is whether these Rule 23 procedures do not apply whenever, and merely because, the class suit is brought by the EEOC.

Before 1972, only an aggrieved private party had authority to institute such litigation,[10] and where the relief sought extended to a class against whom discrimination was directed, the class action procedures of Rule 23 applied.[11] The government's litigation role during this period was limited to suits challenging a "pattern or practice" of discrimination, which only the Attorney General (pursuant to Section 707 of the Act) could file.[12] The EEOC's enforcement authority was restricted to seeking voluntary compliance through "informal methods of conference, conciliation and persuasion." [13] Originally, in 1964, Congress expected that the majority of discrimination cases would be resolved outside of court,[14] but where litigation became necessary, two wholly different remedies were provided—the public's broad interest in combatting patterns of discriminatory conduct was assigned by Section 707 to the Attorney General for enforcement, while

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[10] *See, e.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977).

[11] *See, e.g.*, Gregory v. Litton Sys., Inc., 472 F.2d 631, 633 (9th Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123-25 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33-35 (5th Cir. 1968). *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1219 (1971).

[12] Section 707 contained no provision for a private right of action.

[13] Civil Rights Act of 1964, § 706(a), Pub. L. No. 88-352, 78 Stat. 259 (1964); *see* SENATE COMM. ON LABOR & PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972) (hereinafter "LEGISLATIVE HISTORY").

[14] *Id.* at 414.

Section 706(f)(1) granted the private victim of discrimination remedies to redress individual and class discrimination.

The primary purpose of the 1972 amendments was to grant some form of enforcement authority to EEOC to increase the effectiveness of its conciliation process.[15] Although alternative methods of enforcement were actively considered,[16] the amendments, as finally adopted by Congress, did not change the fundamental nature of the two different judicial remedies created by Sections 706 and 707; rather they gave to the EEOC standing to initiate actions under Section 706 to redress discrimination by non-government employers against private victims, and substituted the EEOC for the Attorney General in Section 707 pattern or practice actions. Sections 706 & 707, 42 U.S.C. §§ 2000e-5, 2000e-6. By so doing, Congress in no way changed the essential character and purpose of Section 706, *i.e.*, to redress private discriminations. The amendments left intact the basic nature of a Section 706 suit, whether the plaintiff be a private individual or the EEOC suing as representative and on behalf of private individuals. In either event, a suit under Section 706 is the vehicle by which Congress sought to implement the goal at the heart of Title VII, "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976).

The court below held that, when the EEOC brings a Section 706 action seeking class relief, it need not comply with the requirements of Rule 23 even though the remedies sought are identical to those available to a private party plaintiff in an identical class action suit. The

[15] *See, e.g., id.* at 63-64, 413-14.

[16] *See* note 20 *infra*.

decision rests on an incorrect construction of Title VII, supported neither by the language nor the legislative history of the 1972 amendments, and is reminiscent of the long-discredited notion that government agencies are not subject to the same procedural rules that apply to other litigants.[17]

Consider first the statutory language. In the 1972 amendments, Congress first added an introductory subsection to Section 706 declaring that the EEOC "is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice." Section 706(a), 42 U.S.C. § 2000e-5(a). It then amended relettered subsection (f) to provide that, if the Commission cannot secure a satisfactory conciliation agreement through its internal procedures, "the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision . . . ." Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). It went on to make certain changes in procedures before the EEOC. Sections 706(b) and (e), 42 U.S.C. §§ 2000e-5(b) & (e). Before the 1972 amendments, only a private and injured party could bring such a civil action. *See* note 10 *supra* and accompanying text.

Implicit in the 1972 amendments is the premise of the general applicability of the Federal Rules of Civil Procedure, and conspicuous by its absence is any evidence whatsoever that Congress intended to alter the procedural requirements otherwise applicable to Section 706 civil actions in federal district courts.[18] Rule 1 of the Federal

[17] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958); 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1027, at 118-19 (1969); Holtzoff, *Procedural Rules When Government Is a Litigant*, 26 A.B.A.J. 391 (1940); Comment, *supra* note 7, 46 U. CHI. L. REV. at 699 n.63.

[18] Although the statutory language contains no express requirement that EEOC comply with Rule 23, it is apparent that Congress assumed the general applicability of the Federal Rules, *see* note 21,

Rules of Civil Procedure, which declares them applicable "in all suits of a civil nature," refers to Rule 81 for a list of exceptions, and EEOC actions under Section 706 are not included in the long list of exceptions.[19] The importance and weight of the procedural requirements embodied in the Federal Rules are reflected in the precise and complex manner Congress deliberately chose for promulgating and amending those Rules. *See* 28 U.S.C. § 2072. A departure from the Rules, especially one completely abrogating an entire rule for an entire class of lawsuits, is not lightly to be inferred from an Act of Congress that does not explicitly amend the Federal Rules or, indeed, even mention Rule 23.

Just as the language of the 1972 amendments to Section 706 does not justify the view that Rule 23 has been abrogated for Section 706 actions brought by the EEOC, so too the legislative history provides not even a prop

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infra, and only made explicit reference to specific rules when the statutory language appeared to render a rule inapposite. Section 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), is an example of a provision added to Title VII by the 1972 amendments where it was necessary to refer to a particular Federal Rule that otherwise would not have been applicable. This section permits the EEOC to file an action in district court for "temporary or preliminary relief," not as an initial step in a suit ultimately seeking a permanent injunction, but to aid the agency in discharging its role as conciliator. *See* EEOC v. Pacific Press Publishing Ass'n, 535 F.2d 1182, 1185 (9th Cir. 1976). Without a specific reference, Rule 65, which is directed to *interlocutory* preliminary injunctions and temporary restraining orders, would have been inapplicable to actions under Section 706 (f)(2) where "temporary or preliminary relief" constitutes a *final judgment*. Furthermore, the rule may otherwise also have been inapplicable to Section 706(f)(2) suits because, by its terms, it does not apply where it would modify a federal statute "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." FED. R. CIV. P. 65(e).

[19] In contrast to the omission of EEOC Section 706 suits, Rule 81 expressly exempts proceedings to enforce orders of the National Labor Relations Board, including back pay orders. *See* FED. R. CIV. P. 81(a)(5); EEOC v. D. H. Holmes Co., *supra*, 556 F.2d at 795.

for the decision below. On the contrary, the legislative history confirms that Congress intended full application of the Federal Rules to EEOC actions under Section 706 and, more specifically, that Congress understood the class action nature of Section 706 actions when it granted the EEOC standing to bring such actions, and assumed that Rule 23 would apply whether the suit was brought by private individuals or by the EEOC in its own name on their behalf.

Indeed, the Senate and House floor debates[20] indicate that one principal reason Congress chose to strengthen the EEOC's hand by permitting it to file court suits rather than issuing cease and desist orders was a strong desire, clearly expressed again and again throughout the debates,[21]

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[20] The Congressional purpose behind the enforcement provisions of the 1972 amendments must be derived from the floor debates rather than from committee reports because in both the House and the Senate, the bills reported out of Committee providing for EEOC cease and desist authority were rejected on the floor after lengthy debate and replaced by language authorizing the EEOC to file suit in Federal District Court. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361-64 (1977). Thus, the Committee Reports discuss only the rejected cease and desist provisions and the Conference Report merely states that both the House and Senate authorized EEOC to bring civil actions. *See* LEGISLATIVE HISTORY at 68-71, 426-431, 1815.

[21] *See, e.g.*, LEGISLATIVE HISTORY at 201 (Statement of Rep. Quie: "[T]he procedural . . . safeguards for all the parties involved would be far more adequately assured under the direct court approach"); *id.* at 221 (Statement of Rep. Railsback expressing concern that "the procedural rules governing administrative hearings are virtually nonexistent"); *id.* at 226 (Statement of Rep. Mazzoli, co-sponsor of amendments ultimately adopted in the House, referring to the Committee Report statement that "[a]dministrative tribunals are better suited to rapid resolution . . . [because they] are less subject to technical rules," wherein the Congressman stated, "I am wondering if perhaps in trying to avoid overburdening the Federal Court system, we will overburden alleged defendants"); *id.* at 278 (Statement of Rep. Mazzoli emphasizing the importance of "granting each party his day in court and the fullest protection of all rules, procedural and evidentiary"); *id.* at 807 (Statement of Sen. Allen arguing in favor of court enforcement so that defendants have the protections

to assure all parties the procedural protections of the Federal Rules of Civil Procedure and the traditional judicial rules of evidence. It therefore was no more necessary for Congress to specify Rule 23 in a statute authorizing the EEOC to file class action suits than it was to specify Rule 8 because such suits are commenced by the filing of a complaint or Rule 26 because the EEOC would be subject to discovery. It is quite common that the obvious does not have to be spelled out; no significance can attach to the fact that Congress saw no need to do so in this statute.

More specifically, Senator Javits, a floor manager of the 1972 legislation and the ranking minority member of the Committee that reported it, pointed out to the Senate that it was by virtue of Rule 23 that EEOC would have authority to secure class relief when suing under Section 706. Thus, during debate on a proposed amendment to Section 707, Senator Javits, referring to the Senate's vote of the previous day to authorize EEOC suits under Section 706, explained that if EEOC "can sue for an individual claimant, then . . . [it] can sue for a group of claimants," since "this is provided for by the rules of civil procedures in the Federal courts." [22] Senator Javits went on to state:

"of the customary and time-honored rules of evidence and procedure"); *id.* at 1003 (Statement of Sen. Ervin asserting that the court enforcement amendment "affords an adequate procedure by which the EEOC . . . can have a right of vindication in the court according to the established rules of procedure and the established rules of evidence"); *id.* at 1429 (Statement of Sen. Javits: "The last item, which I think bears repetition . . . is that . . . [u]nder our [court enforcement] amendment, not only the rules of evidence, but the rules of civil procedure . . . will be applicable"); *id.* at 1485 (Statement of Sen. Dominick: "[Y]ou can do far better in a court proceeding which is impartial, organized, and ruled by precedent and established rules of procedure than you can from an administrative proceeding").

[22] *Id.* at 1589.

> I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give[s] the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.[23]

Senator Williams, the Committee Chairman and floor manager of the bill, also demonstrated his awareness that Title VII litigation generally takes the form of class actions and sought to assure that the availability of such actions and the procedural rules governing them would not be disturbed by authorizing the EEOC to bring such actions. Thus, Senator Williams stated in a section-by-section analysis:

> In establishing the enforcement provisions under this subsection [706(f)(1)] and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. . . . [T]he leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints . . . .[24]

There is nothing in the Senator's statement that even intimates that EEOC class actions are to be treated differently from private class actions from the standpoint of Rule 23.

Plainly, these statements by the leading members of Congress responsible for the 1972 amendments squarely contradict the conclusion below that Congress did not

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[23] *Id.* at 1590. The import of Senator Javits' remarks is analyzed in detail in Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 354-57.

[24] LEGISLATIVE HISTORY at 1773. *See id.* at 1847.

intend Rule 23 to apply to Section 706 actions brought by the EEOC.

B. Congress Has Determined That The EEOC Is A Suitable Rule 23 Class Representative In Section 706 Actions

A major thrust in the EEOC's argument below and in other courts where the applicability of Rule 23 to EEOC suits has been raised is its claim that it is incapable of satisfying the Rule 23 prerequisites for class certification.

Rule 23(a) provides that a party may sue as a class representative if it is a member of the class and if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The court below seemed to agree with many of the EEOC's arguments that it was incapable of satisfying the Rule 23 requirements, although at another point in its opinion it reached the opposite conclusion. *Compare* Pet. App. A11-A12 *with id.* A21. A canvass of these requirements will reveal that the EEOC should have no difficulty qualifying for class certification.

1. *Membership.*

It is generally true that the plaintiff in a class action must be a member of the class he seeks to represent. *See, e.g., East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977), *quoting Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). The courts have also recognized that an organization or association established to represent the interests of a class

may satisfy the membership requirement of Rule 23(a).[25] *See, e.g., Smith* v. *Board of Education*, 365 F.2d 770, 777-78 (8th Cir. 1966) (Blackmun, J.); *Undergraduate Student Association* v. *Peltason*, 359 F. Supp. 320, 323 (N.D. Ill. 1973) (three-judge court); *cf. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 551 n.2 (1973). *See also Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937-38 (2d Cir. 1968); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.04[3], at 23-142 to 23-146 (2d ed. 1979). These cases, as Judge (now Mr. Justice) Blackmun has pointed out, turn on whether the organizational plaintiff has standing to bring the action as "a real party in interest." *Smith* v. *Board of Education, supra*, 365 F.2d at 777; *see* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1761, at 591-92 (1972). There is no longer any doubt that an organizational plaintiff has standing to sue in a representative capacity on behalf of its members. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 511, 515 (1975); *National Motor Freight Traffic Association* v. *United States*, 372 U.S. 246, 247 (1963) (*per curiam*).

Although, to be sure, the EEOC is not a voluntary membership association and has suffered no injury to itself, this has not been a barrier to establishing the standing of a public agency to sue in a representational capacity on behalf of a class where the agency's purpose is to

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[25] As one commentator recently noted:

> Rule 23 class actions have, for example, been brought by associations, unions, the next friend of a minor, trustees, executors, and bankruptcy trustees. State attorneys general, with the requisite standing under local law, have been allowed to represent rule 23 classes in federal courts in cases in which the state is not technically a member of the class—for example, in cases in which the class is the school districts in the state.

Comment, *supra* note 7, 46 U. CHI. L. REV. at 711-12 (footnotes omitted).

represent the interests of that class.[26] *See Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343-45 (1977). In the context of Section 706 litigation, Congress has defined the EEOC's mission as seeking redress for victims of unlawful employment discrimination.[27] The Fifth Circuit was therefore correct in stating:

> To hold that EEOC is not a "member of the class" as that term is used in Rule 23 would be contrary to Congress' purpose. Especially when EEOC seeks to recover back pay for individuals, it would seem to be Congress' clear intent that EEOC stand in the shoes of those individuals and represent them in a suit the individuals would otherwise be entitled to bring. Where individuals can institute Title VII suits under Rule 23, it would be anomalous in the extreme to hold that EEOC, an enforcement agency expressly authorized by Congress to sue, may never do so under Rule 23 solely because it runs afoul of the membership requirement.

EEOC v. *D.H. Holmes Co.*, *supra*, 556 F.2d at 796-97 (footnotes omitted).[28]

2. *Adequacy of Representation and Typicality.*

The Court of Appeals in this case was also incorrect, in our view, in finding a conflict between the representational duties of a class action plaintiff under Rule 23

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[26] Governmental entities, as such, are not *per se* ineligible to bring class actions. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972); Illinois v. Bristol-Myers Co., 470 F.2d 1276, 1277-78 (D.C. Cir. 1972).

[27] LEGISLATIVE HISTORY at 1589.

[28] The Ninth Circuit also concluded that the EEOC satisfied the membership requirement of Rule 23(a) by virtue of Congress' decision to grant the EEOC standing to assert the rights of others. Pet. App. A21.

and the EEOC's statutory role under Title VII as "a public agency 'charged with the vindication of public policy, not merely with the enforcement of private rights.'" Pet. App. A16-A18. The court believed that when Congress authorized the EEOC, as well as private individuals, to bring suits under Section 706, Congress had created a dichotomy of roles in which the government protects solely the public interest and the individual plaintiff pursues strictly his private interest. The EEOC urged below and in other courts that this dichotomy precluded it from adequately representing the interests of a class of private individuals.

But all suits under Title VII "'involve the vindication of a major public interest.'"[29] Even a private action under Section 706 vindicates that public interest by redressing the private injury to individual victims of discrimination.[30] When Congress amended Section 706 in 1972, it assigned to EEOC the major burden of such litigation in hopes of strengthening Title VII enforcement, not by creating a new remedy, but by authorizing suits to be brought by a more effective litigator using the existing remedy. In other words, Congress preserved the pre-existing Section 706 remedial mechanism which integrates both public and private interests, but established dual enforcement through government and private litigation. *See* text at 9-10 *supra*. *See also* Comment, *supra* note 7, 46 U. CHI. L. REV. at 705 n.91. The mechanism remained essentially the same; Congress merely provided a new trigger—the EEOC.

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[29] Franks v. Bowman Transp. Co., 424 U.S. 747, 778 n.40 (1976), *quoting* Section-By-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 188 CONG. REC. 7166, 7168 (1972).

[30] Thus, in a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained: "[T]he individual's rights to redress are paramount under the provisions of Title VII." LEGISLATIVE HISTORY at 1772.

The Ninth Circuit's attempt to find a dichotomy of roles between public and private Section 706 suits also overlooks the fact that the private litigant redresses more than his private interests when he sues under Title VII. As this Court has stated:

> In [private actions] . . ., the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The role is akin to that of a "private attorney general who 'takes on the mantel [*sic*] of the sovereign.'" *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), *quoting Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). Thus, whether EEOC or a private litigant sues under Section 706, the nature of the suit is identical and the interests served are identical [31]—the public policy goals of Title VII are promoted by compensating individuals victimized by discrimination and by awarding injunctive relief to ensure against repetition of the same wrongs.

A number of lower courts have sought to separate private and public interests in construing various aspects of Title VII enforcement.[32] It may be significant, however,

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[31] This identity in the nature of the public and private action and the interests served contrasts with other legislative schemes, which involve dual public and private remedies, such as the Sherman Act, where the nature of the actions and the interests served are not identical. *See* United States v. Borden Co., 347 U.S. 514, 518-19 (1954).

[32] *See, e.g.*, Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841, 846 (8th Cir.), *cert. denied*, 434 U.S. 920 (1977); EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 537-40 (9th Cir. 1976), *aff'd on other grounds*, 432 U.S. 355 (1977); EEOC v. General Electric Co., 532 F.2d 359, 373 (4th Cir. 1976); EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297, 1299-1300 (3d Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1359 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). *Contra*, EEOC v. D.H. Holmes Co., 556 F.2d 787, 794 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); EEOC v. Continental Oil Co., 548 F.2d 884, 887 (10th Cir. 1977).

that in the one case that reached this Court in which the lower court's judgment rested on such an argument, two Justices pointedly rejected the argument and the majority affirmed the judgment on an entirely different rationale. *Compare Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 358-73 (1977), *with id.* at 381-84 (Rehnquist, J., dissenting in part). The majority in *Occidental Life* correctly pointed to the EEOC's investigative and conciliation functions as indicating that the agency's mission goes beyond "conducting litigation on behalf of private parties." *Id.* at 368. But the majority expressed no opinion on the nature of the EEOC's role as litigator, and the dissent affirmatively declared that the EEOC's primary function as litigator under Section 706 is to seek redress for discrimination complaints on behalf of individuals that could have brought their own suits. *Id.* at 383.

In *UAW Local 283* v. *Scofield*, 382 U.S. 205, 217-22 (1965), the NLRB took a position similar to that of the EEOC and the Ninth Circuit in this case. The Board claimed to be the "custodian of the 'public interest,' to the exclusion of the so-called 'private interests' at stake." *Id.* at 218. *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 705 n.91. Unanimously rejecting the argument, this Court held that

> the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.

Id. at 220.[33] *Cf. Garner* v. *Teamsters Local No. 776*, 346

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[33] The issue in *Scofield* involved the Labor Board's opposition to intervention of the charging party in judicial review of an unfair labor practice decision upholding the charge. Scofield, *supra*, 382 U.S. at 217.

U.S. 485, 492-501 (1953). The EEOC's claim that its duty is to further public policy goals and not to promote the rights of individual aggrieved parties is even weaker than that of the Labor Board, for unlike the Board which adjudicates unfair labor practice charges in an administrative proceeding, the EEOC was expressly denied such powers in the 1972 amendments and authorized, instead, to sue as an advocate of private litigants. *See Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 361-64.

There is no clash, we submit, between Rule 23 and the public goals of Title VII.[34] Rule 23 harmonizes well with the congressional purposes of Section 706.[35] In essence, Congress decided to assign the EEOC the task of repre-

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[34] The Ninth Circuit's perception of a dichotomy of roles between the EEOC and private claimants led it to conclude that the EEOC

> does not satisfy the requirement of Rule 23 (a)(3) that the "claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Pet. App. A11-A12. The same reasoning supported the court's rejection of the *Holmes* conclusion that EEOC must comply with Rule 23 because, when it sues, it stands in place of a private litigant who, had he sued on his own, would be subject to the rule. Pet. App. A17-A18. Since the court's premise is in error, its conclusion does not follow. Indeed, if the EEOC is to discharge its statutory mission of asserting the claims of aggrieved individuals, its claims not only will be typical of the claims of those individuals, they will be identical. *See Comment*, *supra* note 7, 46 U. CHI. L. REV. at 716 n.144; Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 380-82; Harris v. Anaconda Aluminum Co., 17 FEP Cas. 181 (N.D. Ga. 1978).

[35] As noted below, *see* text at 31-32 *infra*, by recognizing that Rule 23 applies to all Section 706 class actions and not merely to those initiated by private individuals, the ability of federal district judges to protect the interests of class members and thereby further the public policy goals of Title VII will be enhanced by certifying these actions under the rule. *See* FED. R. CIV. P. 23(e); Comment, *supra* note 7, 46 U. CHI. L. REV. at 730-34; *cf.* Hutchings v. United States Industries, Inc., 428 F.2d 303, 310 (5th Cir. 1970).

senting private interests in order to further the public interest. EEOC's view that it is not an adequate representative of private interests would, if accepted by the courts, defeat the legislative purpose.

3. *Numerosity.*

Finally, Rule 23's numerosity requirement—the only other precondition for class certification that has given concern to a lower court—will have no impact on EEOC's ability to discharge its statutory mission. In *EEOC* v. *Whirlpool Corp.*, 80 F.R.D. 10, 19 (N.D. Ind. 1978), the court believed that the numerosity requirement might preclude the EEOC from seeking relief for small classes of employees. This concern, we submit, is unfounded.

Classes consisting of relatively few members have been certified.[36] Existing lower court precedent accordingly should cover the vast majority of cases which the EEOC may file. But even in the isolated case of a small class not covered by existing precedent, no aggrieved party will be denied the opportunity for judicial redress of his grievances. The determination of when a class is too numerous to make joinder impracticable is not based solely on numbers, but may also be determined by the nature of the action and the underlying congressional policy of the regulatory scheme.[37] Here, since Congress has determined that the litigation burden should fall primarily on the EEOC as a representative plaintiff and that private remedial efforts should be the exception,[38] we think Con-

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[36] *See* Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 378-79 and cases cited at 379 nn.166 & 167.

[37] *See generally* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762, at 600-03 (1972).

[38] In a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained:

[Footnote continued on page 24]

gress has made the legislative judgment that joinder, if not impracticable in a technical sense, certainly is undesirable from a policy standpoint. So long as the EEOC has reason to believe that the Act was violated and identifies on whose behalf it is suing, no further showing of numerosity would be needed for certification.

II. EEOC COMPLIANCE WITH RULE 23 WILL PROTECT THE INTERESTS OF AGGRIEVED PARTIES AND DEFENDANTS WITHOUT UNDULY BURDENING EEOC'S ENFORCEMENT ACTIVITY

The court below expressed concern that application of the rule would be "time consuming and costly" and "would serve no useful purpose." Pet. App. A23. This view has no support either in experience or logic. The cases in which the district courts have applied Rule 23 to EEOC Section 706 suits demonstrate no time-consuming, costly, or other impediments to certifying the agency as a class representative.[39] Since the EEOC, before filing suit,

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[38] [Continued]

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC.

LEGISLATIVE HISTORY at 1772.

[39] *See, e.g.*, EEOC v. Datapoint Corp., *supra*, 570 F.2d at 1268; Harris v. Anaconda Aluminum Co., 17 FEP Cas. 181, 182-85 (N.D. Ga. 1978); EEOC v. Delaware Trust Co., Civ. A. No. 75-157 (D. Del. Apr. 24, 1979) (order certifying EEOC as class representative). Two cases in which certification was denied over the EEOC's objection represent unusual circumstances unlikely to influence future cases. In EEOC v. Spector Freight Sys., Inc., 15 EPD (CCH) ¶ 7967 (N.D. Miss. 1977), the court declined to certify the EEOC as class representative *after trial* because there had been no showing that there were any aggrieved parties other than two individuals who were also named plaintiffs in the suit. *Id.* at 6811. EEOC v. Westinghouse Electric Corp., 81 F.R.D. 528 (M.D.N.C. 1979), turns on the court's conclusion that the EEOC made an insufficient showing that an across-the-board class of discrimination

must conduct an investigation of the charge and find reason to believe that Title VII has been violated, it should have no difficulty making the showing required for class certification, particularly in light of the firm congressional policy favoring EEOC class suits as the primary vehicle for redressing unlawful employment discrimination.[40]

Furthermore, far from serving "no useful purpose," one commentator has recently noted that "[r]ule 23 certification plays a central protective role in representative actions" in that it "provides a framework designed to ensure procedural fairness to both class members . . . and defendants." [41] It is both a necessary and an entirely reasonable measure for the orderly processing of Section 706 litigation.

A. EEOC Compliance With Rule 23 Will Protect Defendants' Interests By Promoting Congress' Aim In Achieving Finality Of Litigation And Avoiding Unnecessary Duplication Of Proceedings

Class certification is required to assure that once the issues raised by the EEOC have been adjudicated, they will not be litigated again in suits by individual employees. Absent certification, aggrieved class members (other than the charging party) would not be bound by an EEOC action.[42] They would be free to await the outcome

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victims existed. The court pointed out that the EEOC did not even contest the defendant's principal evidence that refuted an inference of discrimination in hiring. *Id.* at 529-31.

[40] *See* note 47 *infra*.

[41] Comment, *supra* note 7, 46 U. CHI. L. REV. at 717-18.

[42] *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 845 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 65 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

of the suit and eventually to initiate identical Section 706 litigation, but seeking greater relief than was awarded to the EEOC.[43] This would leave defendants open to "repeated lawsuits on the same essential subject matter," Advisory Comm. Note, 39 F.R.D. 69, 91 (1966), possibly leading to inconsistent adjudications.[44] The effect of permitting multiple litigation of the same discrimination charge would be to reward those who sat back with a second "bite of the apple" while penalizing the individual whose charge led to the EEOC action.

In contrast, application of Rule 23 to EEOC Section 706 class litigation generally will bind members of the

[43] *See* Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 207 n.136 (1976):

> [A]n EEOC acceptance of the settlement in its pattern or practice suit against the steel industry, if it is generally perceived to be inadequate, may trigger a number of private actions against different companies, plants, departments, or lines of progression. Although the Commission may have saved itself extensive resources, the consequences could be inefficient in terms of both private plaintiffs and the courts if a multiplicity of suits in different districts follows. There is good reason to believe that at least substantial dissatisfaction exists, although the extent to which it will be reflected in a multiplicity of private actions is unclear.

AT&T subsidiaries which were parties to an AT&T settlement, EEOC v. AT&T, Civ. No. 73-149 (E.D. Pa., filed Jan. 18, 1973), have nonetheless been subjected to subsequent lawsuits brought by individuals. *See, e.g.*, Walker v. Southwestern Bell Tel. Co., 18 FEP Cas. 1784 (N.D. Tex. 1978); Garnett v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1773 (D. Colo. 1977); Peals v. Southwestern Bell Tel. Co., 18 FEP Cas. 1781 (D. Kan. 1977); Butera v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1779 (D. Colo. 1977); LaCombe v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1774 (D. Colo. 1977).

[44] The *Holmes*, *Datapoint*, and *Delaware Trust* courts noted that Rule 23 was needed to protect the defendant from multiple lawsuits on the same claims. EEOC v. D. H. Holmes Co., *supra*, 556 F.2d at 795; EEOC v. Datapoint Corp., 570 F.2d 1264, 1268 (5th Cir. 1978); EEOC v. Delaware Trust Co., 81 F.R.D. 448, 452-53 (D. Del. 1979).

aggrieved class to the judgment in the EEOC suit,[45] thus resolving the claims of class member employees in one proceeding, without subjecting defendants—and courts—to the potential of future time-consuming, expensive litigation in numerous individual actions. *Cf. Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). Rule 23 would thus perform the functions for which it was designed, including eliminating the possibility of inconsistent adjudications on the same facts and avoiding a "multiplicity of activity." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 550-51 (1974). This result is consistent with Congress' goal, set forth in the 1972 amendments, of avoiding duplicative litigation of similar factual and legal issues and with the public policies embodied in Rule 23.[46]

The congressional decision to permit individuals as well as the EEOC to bring Section 706 actions was plainly not intended to permit multiple litigation of the same claims. Congress sought only to ensure that the courts would be available to adjudicate an individual's discrimination charge when the EEOC failed to initiate the litigation.[47] *See, e.g., Alexander* v. *Gardner-Denver*

[45] FED. R. CIV. P. 23(c)(3). *See* EEOC v. Datapoint Corp., *supra*, 570 F.2d at 1268. A carefully drawn Rule 23(c)(3) judgment will bind all class members provided their interests have been adequately represented and they have been accorded due process in the conduct of the litigation. *See* Hansberry v. Lee, 311 U.S. 32, 41-43 (1940); Advisory Comm. Note, 39 F.R.D. 69, 106 (1966); 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1789, at 175-84 (1972).

[46] The Federal Rules of Civil Procedure were amended in 1966 to prevent precisely the type of one-way class suits that the EEOC seeks to bring. *See* Advisory Comm. Note, 39 F.R.D. 69, 105-06 (1966).

[47] In a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained:

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the

Co., 415 U.S. 36, 44-45 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973). Thus, Congress strictly limited the circumstances under which private parties are free to sue to the following: (1) when the EEOC has dismissed a charge, or (2) when no court action has been commenced by the EEOC and no conciliation agreement satisfactory to the complainant has been obtained within 180 days of the filing of the charge with the EEOC or within 60 days of the expiration of a referral of the charge to an appropriate state agency, whichever occurs later. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

Once a private suit has been filed, most lower courts have held that the EEOC may not file a duplicate action but may proceed only by way of permissive intervention in the pending action, unless its allegations of discrimination are broader than those of the charging party. *See, e.g.*, *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115, 1119 & n.3 (8th Cir. 1977); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *cf. EEOC* v. *Continental Oil Co.*, 548 F.2d 884, 888-90 (10th Cir. 1977). Moreover, a final adjudication of a private action bars

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offices of the EEOC. However, as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues of relief be left open for quick and effective relief.

In providing for the individual right to sue in the event that action by the Commission is unsatisfactory or unresponsive, it is not intended that duplication of proceedings should be allowed. Therefore, in any proceeding where the General Counsel or the Attorney General, as the case may be, is proceeding with due diligence within the time limits specified in this subsection, the person aggrieved would be precluded from instituting an individual action until such time as one of the specific conditions of this subsection are not met.

LEGISLATIVE HISTORY at 1772; *See* EEOC v. Missouri Pac. R.R., 493 F.2d 71, 73-75 (8th Cir. 1974).

relitigation of the same charge in a subsequent suit initiated by the EEOC (*EEOC* v. *Huttig Sash & Door Co.*, *supra*, 511 F.2d at 456), and if the EEOC commences an action under Section 706, the charging party is barred from commencing his own suit and is limited to intervention in the government action. *See McClain* v. *Wagner Electric Corp.*, *supra*, 550 F.2d at 1119; *EEOC* v. *Western Electric Corp.*, 382 F. Supp. 787, 793 (D. Md. 1974).

Thus, nothing in the Act contemplates the availability of a second forum to private individuals dissatisfied with the *judicial* outcome of a discrimination complaint. Congress permitted only one judicial action and that action was to provide a final adjudication and remedy of a particular charge of discrimination. No statutory purpose is served by the EEOC's resistance to a procedure that could bind class members, subject to the protections of Rule 23, to the same extent that the charging party is now bound by the outcome of an EEOC-initiated Section 706 suit or class members are now bound when the named class plaintiff is a private individual. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 108-11 (5th Cir. 1975) (class action); *EEOC* v. *Western Electric Co.*, *supra*, 382 F. Supp. at 793 (individual suit).

Aside from promoting finality and foreclosing duplicative suits, application of Rule 23 is also necessary in order to alert the defendant to the scope of the action being brought against it. The defendant in *Holmes* did not yet know "against whom and upon what grounds precisely it must defend" itself a full year and a half after the commencement of the suit. *EEOC* v. *D. H. Holmes Co.*, *supra*, 556 F.2d at 796; *see EEOC* v. *Delaware Trust Co.*, *supra*, 81 F.R.D. at 450-51. Understandably, the EEOC wishes to postpone the necessity of defining the class it represents as long as possible, but Rule 23 does not require identifying every potential class member at the outset of the litigation, and it does not prevent a

redefinition of the class in light of developments during the litigation. See 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760, at 580-83 (1972). The EEOC presumably has a reasonable basis for defining the class it seeks to represent when it commences litigation, because the agency has the benefit of its pre-complaint administrative investigation. There is no justification therefore, for excusing the EEOC from the obligation of advising its adversaries, potential class members, and the trial court of the scope of the class it represents.

B. EEOC Compliance With Rule 23 Will Protect The Interests Of Aggrieved Individuals By Clarifying The Scope Of The Suit And By Imposing Court Supervision On The Action

EEOC's insistence on filing class actions without Rule 23 certification also prejudices the interests of aggrieved individuals. In particular, the uncertainty generated by EEOC's assertion of the right to maintain a flexible class definition throughout litigation under Section 706[48] may cause some employees to refrain from filing charges or decline to proceed with a lawsuit after receipt of a right to sue letter in the mistaken belief that EEOC is representing their interests. This may result in their claims being barred by time. Section 706(e), (f), 42 U.S.C. § 2000e-5(e), (f).

If non-charging class members choose to file individual charges followed by their own Section 706 lawsuits, they may find that the court will not certify their suit as a class action during[49] or after an EEOC suit encompassing the same class,[50] or will refuse to award any relief that

[48] *See* text at p. 29 *supra*.

[49] *See, e.g.*, Franklin v. General Electric Co., 15 FEP Cas. 1085, 1085-86 (W.D. Va. 1975); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73, 75-77 (E.D. Mich. 1975).

[50] *E.g.*, Walker v. Southwestern Bell Tel. Co., 18 FEP Cas. 1784, 1786 (N.D. Tex. 1978); Garnett v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1773, 1774 (D. Colo. 1978); Peals v. Southwestern Bell Tel. Co., 18 FEP Cas. 1781, 1782-84 (D. Kan. 1977).

is duplicative of or inconsistent with the result reached in the EEOC action.[51] The effect will be to saddle absent class members with Rule 23's binding effect without any of the safeguards provided by the rule. *See generally* Comment, *supra* note 7, 46 U. CHI. L. REV. at 719-21.

Application of Rule 23 will eliminate any ambiguity concerning who is embraced in the class represented by the EEOC and who remains outside. This will put parties outside the class on notice that, if their interests are to be protected, they must take some action beyond relying on the EEOC. Furthermore, when judgment is entered, Rule 23(c)(3) requires a precise identification of the class. If an individual outside the class files a subsequent private suit, there will no doubt that the individual plaintiff was not a beneficiary of the relief granted in the first suit.

If the EEOC is certified as class representative and, for some reason, a class member is dissatisfied with the EEOC's representation of his interests, the individual may be permitted to intervene in the action. *See* FED. R. CIV. P. 23(d)(2). In addition, class certification brings into play a detailed scheme for judicial control of the litigation designed in part to protect the interests of absent class members and generally "to check possible abuse of the class device." *EEOC* v. *D. H. Holmes Co.*, *supra*, 556 F.2d at 795; *see* FED. R. CIV. P. 23(d), (e). For example, absent class members' interests are protected by the Rule 23 requirement that they be furnished notice of a proposed dismissal or settlement of the action, and that any dismissal or settlement be subject to prior court approval. FED. R. CIV. P. 23(e). Because the full range of interests is more likely to be brought to the court's attention in such a circumstance, the quality of

[51] *See* United States v. City of Jackson, 519 F.2d 1147, 1152 n.10 (5th Cir. 1975); Leisner v. New York Tel. Co., 358 F. Supp. 359, 369-70 (S.D.N.Y. 1973).

relief is likely to be higher than in the case of an unsupervised EEOC settlement outside the Rule 23 context.[52]

C. Application Of Rule 23 To EEOC Class Actions Will Promote Title VII Enforcement By Encouraging Settlement And Improving The Quality Of Relief Obtained

The certainty of a final and binding judicial decision emanating from a Section 706 class suit instituted by the EEOC enhances the possibility of pretrial settlement of litigation. As the leading treatise on Title VII points out:

> First, defendants would be more likely to settle with the EEOC if the settlement could be a consent decree with a certified class representative, which would have a *res judicata* effect on the class. Next, the desirable feature of finality would attach to a judgment in a litigated case, whether in favor or against the class represented by the EEOC, which would preclude further litigation on the same issues, which is not necessarily the case when the EEOC sues without being certified as a class.

SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1106-07 (1976). *See also* Comment, *supra* note 7, 46 U. CHI. L. REV. at 731.

And finally, applying Rule 23 will promote procedural consistency in Title VII litigation. The Fifth Circuit predicted in *Holmes* that "[i]f EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question." *EEOC* v. *D.H. Holmes Co.*, *supra*, 556 F.2d at 796. The opinion below suggests that trial courts have the discretion on the basis of the broad remedial authority granted by Section 706(g), 42 U.S.C. § 2000e-5(g), to apply procedures comparable to those embodied in Rule 23 without being bound by the strictures of Rule 23. Pet. App. A23-A24. This broad reading of Section 706(g) is unsupported by any authority. But, in any case, the danger in the *ad hoc* approach suggested by the Ninth Circuit is that it provides no standards to guide judges and litigants to ensure that all interested parties, including absent class members, will get the protection they need. As the Ninth Circuit obviously recognized, safeguards such as those in Rule 23 are needed; and the best way to implement those safeguards is to apply the familiar and carefully designed procedures of Rule 23.

[52] *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 730-31.

D. The Fact That Rule 23 Has Not Been Applied To Section 707 Pattern Or Practice Suits Does Not Justify The Same Result In EEOC Section 706 Cases

A principal factor in the Ninth Circuit's reasoning was its belief that a uniform practice with respect to the applicability of Rule 23 should be followed in EEOC cases under both Sections 706 and 707. Since no court had applied Rule 23 to Section 707 cases, the court reasoned that the similarities between the two statutes necessitated a uniform result. Pet. App. A18-A21. This reasoning ignores the significant differences between Sections 706 and 707.

Unlike Section 706, only the EEOC may institute Section 707 cases, a power it inherited from the Attorney General in 1972. *See* text at 10. A private party seeking redress against discrimination may sue only under Section 706. *See, e.g., United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *EEOC* v. *United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). Furthermore, at least one court has ruled that aggrieved individuals have no right even to intervene in a Section 707 action, *see Allegheny-Ludlum Industries*, *supra*, 517 F.2d at 843-46, a right

which Title VII grants in Section 706 actions brought by the EEOC. *See* Section 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1).

Thus, Section 707 creates a right of action which belongs solely to the EEOC while Section 706 authorizes the agency to sue on behalf of individuals. It is therefore not illogical to hold Rule 23 applicable only to Section 706 class suits, not to Section 707 actions. *See EEOC* v. *D.H. Holmes Co., supra,* 556 F.2d at 792 n.8.

We recognize, however, that a good case still may be made for applying Rule 23 to Section 707. Two commentators have explicitly urged such a construction. *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 694-96; Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 390-94. Their main argument is that it would be incongruous to apply different procedural rules since Section 707(e), 42 U.S..C § 2000e-6(e), directs that "[a]ll . . . actions [under Section 707] . . . shall be conducted in accordance with the procedures set forth" in Section 706. There is ample indication in the legislative history of the 1972 amendments that Congress thought there was little practical difference between Section 706 and 707 once the EEOC was authorized to file actions under both. *See* LEGISLATIVE HISTORY at 1587, 1589. Certainly, the two sections, if not co-extensive, overlap to a large degree. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S 324, 336 & n.16, 357-62 (1977). Applying Rule 23 uniformly to all class suits under Sections 706 and 707 would have the salutary effect of eliminating the danger of duplicative suits for the entire range of EEOC enforcement cases.

This issue, however, need not be resolved in this case since the present suit was filed only under Section 706. Whatever the merits of applying Rule 23 to a future Section 707 case, the case for applying Rule 23 to all Section 706 class actions is compelling.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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